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No. 85-183

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAMES E. AMEND, *et al.*,
Petitioners,

v.

H. BRYAN POFF, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT, AMARILLO NATIONAL BANK, IN OPPOSITION

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BRIEF OF RESPONDENT, AMARILLO NATIONAL BANK, IN OPPOSITION

The Respondent, Amarillo National Bank, respectfully prays that the Petition for a writ of certiorari of the Petitioners, James E. Amend and J. D. Amend, be denied.

STATEMENT OF THE CASE

We supplement briefly the statement of the case made by Petitioners.

We attach as Appendix A to this reply a reproduction of the notice of appeal to which reference is made in the Petition. It is apparent that this is not a case

in which the Supreme Court acquires jurisdiction by direct appeal pursuant to 28 U.S.C.S. 1252 and 1253. Accordingly this reply addresses itself only to the Petition for Writ of Certiorari.

Since the particular emphasis of the Petition is upon the act of Judge Poff in declaring a mistrial in a case tried in the 47th District Court of Potter County, Texas, it is recorded that the record before the Court of Appeals includes, as part of the appendix to the Bank's reply to the Amend motion for partial summary judgment, reproductions of four filed instruments in the Potter County suit,

(1) the order granting severance or separate trial (R.pp. 289, 290),

(2) the order with respect to the Bank's motion for partial summary judgment (R.pp. 291, 292),

(3) the charge of the Court and the jury's verdict (R.pp. 293 to 303) and

(4) the Bank's motion for judgment non obstante veredictor, alternatively for mistrial, alternatively for remittitur (R.pp. 304 to 308).

Brief reference must be made to Appendix C to the Petition for Writ of Certiorari. The Clerk of the Court of Appeals returned, unfiled, because received out of time, a reply brief tendered by the Amends. This reply brief, together with some related correspondence, is attached as Appendix C to the Petition. We say only that, having been returned unfiled, it constitutes no part of the record and that no complaint is now directed to the return of the brief unfiled.

REASONS FOR DENYING THE WRIT

I. Because the Seventh Amendment has not been viewed by this Court as applicable to trials in State Court, the granting of the mistrial by Judge Poff does not give rise to a substantial question of Federal Law.

The question presented for determination is stated in the Petition in this language:

> "Whether the Act of a Member of the Judiciary acting in His Judicial Capacity Whereby He reexamines Facts Tried by a Jury and Overturns the Jury's Verdict Constitutes a Substantial Federal Question Pursuant to the Seventh Amendment to the United States Constitution."

This question is directed to Judge Poff's declaring of a mistrial in the suit tried in Potter County, Texas.

This Court has consistently held that the Seventh Amendment relates only to trials in Federal Court and that States are left to regulate trials in their own courts in their own way. Cases supporting this statement include:

Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1876),

Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908),

Wagner Electric Manufacturing Company v. Lyndon, 262 U.S. 226, 43 S.Ct. 589, 67 L.Ed. 961 (1923),

Colgrove v. Battin, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973), and

Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974).

In the case last cited, in footnote 6 to page 265 of 39 L.Ed.2d, we find this language:

> "Moreover, the Seventh Amendment issue in this case is in a very real sense the narrower ground of decision. Section 812(a) expressly authorizes actions to be brought 'in appropriate State or local courts of

> general jurisdiction,' as well as in the federal courts. *The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.* Since we rest our decision on Seventh Amendment rather than statutory grounds, we express no view as to whether jury trials must be afforded in § 812 actions in the state courts." (Emphasis ours).

In the light of these cases, we say that there is no violation of constitutional or other federally protected right in Judge Poff's granting of a mistrial.

II. Even under the Federal Court practice there would have been no Seventh Amendment violation in the granting of a mistrial.

Even in the federal court practice, where without question the Seventh Amendment is applicable, it is held that there is no Seventh Amendment violation in the exercise of the Court's power to grant a directed verdict or a summary judgment or in the remittitur practice. *Tarlton v. Exxon*, 688 F.2d 973 (5 Cir. 1982); *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522 (11 Cir. 1983). This follows from the fact that in granting directed verdicts or summary judgments or in requiring remittiturs the Court is dealing with questions of law which the Court must determine and which do not require the intervention of a jury.

Support for this view is found further in *C. A. Treat Manufacturing Company v. The Standard Steel & Iron Company*, 157 U.S. 674, 15 S.Ct. 718, 39 L.Ed. 853 (1895). There the trial judge had directed a verdict, and the complaint made to this Court was that this denied the right of trial by jury. The holding of this Court was that when the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover and that a verdict, if rendered for the plaintiff, must be set aside, the Court may instruct the jury to find for

the defendant. If in so doing the Court errs as a matter of law, the remedy lies in a review in the appropriate court.

The Appendix to the Bank's reply to the Amend motion for partial summary judgment tells the Court that in accordance with Texas practice the jury had returned as its verdict its answers to the special issues submitted in the Court's charge, that the Bank had filed a motion for judgment non obstante veredicto, alternatively for mistrial, alternatively for remittitur (R.pp. 293 to 308), and that the question which thus faced Judge Poff was whether any judgment could be rendered in favor of plaintiff and, if so, for how much. A part of the problem was that the jury, while assessing punitive damages, had found none of the facts essential under Texas law to the assessment of punitive damages. Judge Poff responded to the Bank's motion by declaring a mistrial. In this there would have been no Seventh Amendment violation even if the case had been tried, and the action taken, in Federal Court.

The Amends make the purely conclusory allegation that the jury's answers entitle the plaintiff, James E. Amend, to a specific damage recovery and thus this petitioner was deprived of constitutionally and federally protected rights when Judge Poff declared a mistrial. The Amends have cited no cases supporting this view and we find none.

III. The petition does not demonstrate the violation of any constitutionally or otherwise federally protected right by any act charged to the other judicial defendants.

The primary reference we detect in the petition to the other judicial defendants is the statement, at pages 13 and 14 of the petition, that Judges Marshall, Blackburn and Sheehan have all refused to hear Amends' real property title matters in their proper places of venue. It is a sufficient reply that venue is necessarily determined

by the Texas statute. The Amends have cited no cases, and we find none, suggesting even remotely that a judge's ruling on a venue question can accomplish a violation of constitutionally or otherwise federally protected right.

IV. The existence of judicial immunity with respect to the Amends' demand for monetary damages is no longer an open question.

Although the Question Presented, as stated by the Amends, is addressed to Judge Poff's granting of a mistrial, the first reason stated for granting the writ is that the question of judicial immunity remains an important question of federal law which has not been settled by this Court. We find no justification for this. *Pulliam v. Allen*, —— U.S. ——, 104 S.Ct. ——, 80 L.Ed.2d 565 (1984), leaves undisturbed the principle of judicial immunity with respect to damage demands. This can hardly be regarded as an open question; but, if there be any continuing question as to the extent of judicial immunity, this cannot be a reason for granting a writ with respect to the non-judicial respondents.

V. The Amend suit was properly dismissed as to the non-judicial defendants because the facts pleaded, if accepted as true, do not show that the non-judicial defendants acted under color of state law.

The complaints addressed to the respondent, Amarillo National Bank, relate to the administration of a Trust. For purposes of this discussion, we think it suffices to say that the complaint asserts that in many and varied particulars the Bank failed to perform its duties as a fiduciary. This disagreement first reached the courthouse with the filing of two suits in Potter County which were ultimately consolidated into the suit which was tried in Judge Poff's Court. Since that first suit there have been a number of suits. In some of these the Bank has been the defendant. The Bank's position in each

of the cases to which it has been a party has been that of a defendant. With respect to the other defendants, excepting the State Court Judges, complaint is made of acts which are said to have assisted the Bank and to have harmed the Trust Beneficiary.

In *Taylor v. St. Clair*, 685 F.2d 982 (5 Cir. 1982), at page 987, the Court says:

> "It is axiomatic that in order to be entitled to relief under 42 U.S.C. § 1983, a plaintiff must show that he was deprived of a right secured to him under the Constitution or federal law, and that the deprivation occurred under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155-156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970); *Herwald v. Schweiker*, 658, F.2d 359, 362, n.5 (5th Cir. 1981); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611 (5th Cir. 1980). The phrase 'under color of state law' found in 42 U.S.C. § 1983, reflects the 'state action' requirement of the Fourteenth Amendment, consequently both phrases express the same legal principle. *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 877, n.7 (5th Cir. 1975). *cert denied* 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975); *Parish v. National Collegiate Athletic Association*, 506 F.2d 1028, 1031, n.6 (5th Cir. 1975)."

In *Earnest v. Lowentritt*, 690 F.2d 1198 (5 Cir. 1982) at pages 1200, 1201, the Court says:

> "Section 1983 does not reach all constitutional injuries, but only those caused by persons acting 'under color of state law.' 42 U.S.C. § 1983; *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). To act under color of state law for § 1983 purposes does not require, however, that the defendant be an officer of the state. Private acts or

conduct may incur liability under § 1983 if the individual is a 'willful participant in joint action with the State or its agents.' *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed. 2d 142 (1970), quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966). Of course, the requisite 'joint participation' envisioned in *Adickes* goes beyond the mere use of the state court system by private litigants in the course of an ordinary lawsuit. As stated by this Court in *Hollis v. Itawamba County Loans*, 657 F.2d 746 (5th Cir. 1981), 'no state action is involved when the state merely opens its tribunals to private litigants.' Id. at 749. Within the context of individual dispute resolution, a private party acts under color of state law only when there is corruption of judicial power by the private litigant. In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), for example, the state court litigants bribed the judge and obtained an injunction which deprived their adversary of property. The private individuals were considered to have acted under color of state law for § 1983 purposes, regardless of the judge's immunity or liability.

. . . . . .

"Even if this Court did read the complaint as alleging illegal joint action between the judge and the defendants, the record is totally devoid of any facts at all to support a finding that the state judge was improperly or maliciously involved in the foreclosure. Any assertion of illegal motive on the part of the judge is purely conclusory, unsupported by any pleaded facts.

"The Earnests also allege that the Lowentritts acted under color of state law in undertaking the foreclosure action and in acquiring the 850 acres by sheriff's sale. The Supreme Court has characterized the private use of state legal procedures for purposes of the Fourteenth Amendment as attributable to the state only in situations where the state has created

a system which allows state officials to attach property on *ex parte* application. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) (state created garnishment procedure); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (execution of a vendor's lien to secure disputed property); *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (state created garnishment procedures); *Lugar v. Edmondson Oil Co.*, —— U.S. ——, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), (state replevin statute). A recent decision of this Court is illustrative. In *Hollis v. Itawamba County Loans, supra,* an automobile buyer who claimed that his car was seized from him by an abuse of the state replevin proceedings was held to have stated a presumptively valid § 1983 claim for damages through improper use of state power. 657 F.2d at 750. In *Hollis,* unlike the situation in the present case, the creditor was acting pursuant to a state statute which permitted pre-judgment seizure of property without benefit of a hearing. It is in these *ex-parte, prejudgment* situations that the courts have found the state is itself participating in the deprivation of property, and the constitutional requirements of due process apply. Private misuse of a state statute alone does not describe conduct that can be attributed to the state. It is the procedural scheme created by the statute that is state action, and therefore subject to constitutional restraints. *Lugar v. Edmondson Oil Co., supra.* The absence of a full adversary adjudication prior to seizure triggers the constitutional due process issue since state officers typically act jointly with a private creditor in securing the property in dispute.

. . . . . .

"Thus, it is not enough that the Lowentritts utilized state court procedures to satisfy a debt owed by Jesse Earnest. Nor can the State of Louisiana be said to have compelled the defendant to bring the foreclosure action. The fact that Louisiana permitted

> the foreclosure and subsequent sale of the Earnest land as the execution of a judgment obtained in the private adversary proceeding is not sufficient to raise the issue of state action. The Lowentritt foreclosure on the mortgage given to him by Jesse Earnest was a purely private dispute, immune from the coverage of § 1983 lacking a showing of further state involvement."

The opinion continues then to discuss the requisites of a conspiracy action under 42 U.S.C. 1985(3), the holding being in substance that the failure to allege or prove any racially-based animus underlying the conspiracy mandates the dismissal of the action.

In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), at pages 189 and 190 of 66 L.Ed.2d, the Court says:

> "As the Court of Appeals correctly understood our cases to hold, to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions. *Adickes v. S.H. Kress & Co.*, 398 US 144, 152, 26 L Ed 2d 142, 90 S Ct 1598 (1979); *United States v. Price*, 383 US 787, 794, 16 L Ed 2d 267, 86 S Ct 1152 (1966). *Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.* But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability." (Emphasis ours).

In *Arsenaux v. Roberts*, 726 F.2d 1022 (5 Cir. 1982), at page 1024, the Court says:

> "A conspiracy cannot be divined from allegations of trial errors, the ex parte amendment of the complaint after improper communications, and the assessment of court costs. To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act. *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979). The conspiracy allegations made by Arsenaux are conclusory, and more than a blanket of accusation is necessary to support a § 1983 claim. *Aldabe v. Aldabe*, 616 F.2d at 1092, *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977). See also *Cole v. Gray*, 638 F.2d 804, 811 (5th Cir.), *cert. denied*, 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981); *Newbold v. United States Postal Service*, 614 F.2d 46, 47 (5th Cir.) (per curiam), *cert. denied*, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d 101 (1980).
>
> . . . . . .
>
> "Arsenaux has failed to state any factual basis to support the charge that his wife's lawyer conspired with the state trial judge. Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss."

In *Fullman v. Graddick*, 739 F.2d 553 (11 Cir. 1984), at pages 556 and 557, the Court says:

> "In civil rights and conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required. In civil rights actions, it has been held that a complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory. See, e.g., *Burnett v. Short*, 441 F.2d 405 (5th Cir. 1971); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970); *Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969). In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed. See *Ostrer v. Aron-*

wald, 567 F.2d 551 (2d Cir. 1977); *United States Ex Rel. Simmons v. Zibilich*, 542 F.2d 259 (5th Cir. 1976); see also *Black v. United States*, 534 F.2d 524 (2d Cir. 1976); *Fine v. City of New York*, 529 F.2d 70 (2d Cir. 1975). A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy. 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 8,17 [5] at 8-180, 181 (2Ed. 1984)."

In *Phillips v. Mashburn*, 746 F.2d 782 (11 Cir. 1984), at page 785, the Court says:

"We note that the district court incorrectly dismissed Phillips' action as an attempt to retry the state lawsuit. Phillips' allegations, if proven, might entitle him to some relief: a state court judge, although immune from damages under section 1983, when acting in conspiracy with private defendants can supply the state action nexus required for a section 1983 suit. *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S.Ct. 183, 186-87, 66 L.Ed.2d 185 (1980).

"Phillips' complaint, however, makes no particularized showing that a conspiracy existed between the defendant lawyers and the judge; it only alleges that the defendants won the lawsuit. Obviously, being on the winning side of a lawsuit does not make a defendant a co-conspirator or a joint actor with the judge who presided over the case. Id., at 28, 101 S.Ct. at 186. We must therefore decide whether the district court erred by dismissing sua sponte an in forma pauperis pro se complaint which alleged a cognizable section 1983 action based on a conspiracy between a state judge and private defendants, but contained inadequate supporting factual averments.

"We hold that the district court properly exercised its discretion in dismissing the complaint pursuant to section 1915(d). The naked assertion of a conspiracy between a state judge and private defendants without supporting operative facts provides an in-

sufficient state action nexus for a section 1983 action. *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983)."

Repeatedly through their complaint petitioners charge in general terms collusion, conspiracy and fraud on the part of respondents. However, construing these allegations as liberally as a pro se complaint is entitled to be construed, we question that the complaint ever gets around to alleging that any act of any judge was the product of judicial corruption or the product of improper agreement with any litigant or its attorney. If the complaint can be so construed, it seems plain that petitioners' allegations are purely conclusory and that no facts are alleged which would warrant such a conclusion. Under the cases cited this leads inevitably to the conclusion that, so far as the respondents other than the State Judges are concerned, there is missing altogether from the complaint the essential element that these respondents acted under color of state law. So far as these respondents are concerned, petitioners' suit was properly dismissed on the pleadings.

VI. Giving the appropriate consideration to this Court's Rule 17, petitioners completely fail to demonstrate the propriety of the writ of certiorari sought.

Petitioners speak of a decision below inconsistent with the usual course of judicial proceedings and sufficient to call for an exercise of this Court's power of supervision. This contention, though, is founded upon petitioners' mistaken assertion that there has been a violation of petitioners' constitutionally or otherwise federally protected rights in

(1) the mistrial declared by Judge Poff, and

(2) the venue rulings attributed to other judges.

To this it is a sufficient reply that petitioners nowhere demonstrate that constitutionally or otherwise federally

protected rights are involved; and, in the absence of this, there is no federal question,—certainly, none of substance.

Petitioners speak then of "obfuscation." Here we find it difficult to grasp just what the petitioners are saying; but apparently petitioners contend that the respondents have confused and beclouded the issues and that the courts below have done likewise. So far as this petitioner, Amarillo National Bank, and its attorneys, R. A. Wilson and D. Barry Stone, are concerned, it should be a sufficient reply that the positions taken find support in the authorities cited and do not fairly lend themselves to the charge of confusing or beclouding the issues. Certainly the opinions below find complete support in the authorities cited.

Petitioners inject the charge that attorney R. A. Wilson has filed false pleadings in the several state court matters. This charge we challenge. The problem is that the charge is completely foreign to the record before the Court and debates in this area lend no aid to the solution of the question here presented, whether there is any justification for the issuance of the writ of certiorari sought.

In addition to what has been said we refer briefly to these further principles:

FIRST: A litigant may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action. *Hagerty v. Succession of Clement*, 749 F.2d 217 (5 Cir. 1984) and cases cited.

SECOND: In a Section 1983 action this Court accords to the prior state court judgments the same preclusive effect that they would have in the state courts. *Migra v. Warren City School Dist. Bd. of Educ.*, — U.S. ——, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)

To the extent that petitioners' complaints are addressed to judgments actually rendered by the judicial defend-

ants, it is significant that there is complete silence in the complaint with respect to any effort on the part of petitioners to exercise the rights of appeal available to them under state law.

Petitioners demonstrate no reason at all why the writ of certiorari sought should be granted.

CONCLUSION

The Respondent, Amarillo National Bank, speaks only for itself and does not assert the right to speak for any other Respondent. However, in asserting its own rights, it must take into account each of the grounds upon which petitioners seek the granting of the writ, even if those grounds relate to other Respondents, and this it has done. This Respondent submits respectfully that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Notice of Appeal From Federal Court, Civil Case

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. CA-2-84-161

JAMES E. AMEND, *et al.*,
Plaintiffs,

v.

H. BRYAN POFF, JR., *et al.*,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that James E. Amend and J. D. Amend, the plaintiffs above named, hereby appeals to the Supreme Court of the United States from the (affirmation by the United States Court of Appeals, Fifth Circuit, of the judgment of the trial court), entered in this action on June 3rd, 1985.

This appeal is taken pursuant to 28 U.S.C. 1253

(Signed) /s/ James E. Amend
JAMES E. AMEND,
PRO, SE

/s/ J. D. Amend
J. D. AMEND, PRO, SE

Appellants,

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